

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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ANIBAL MALDONADO,

Petitioner,

-v-

RICHARD A. SAVAGE,  
Superintendent of Gowanda  
Correctional Facility,

Respondents.

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FILED  
2008 MAR -4 AM 11:14

-PS-0-

U.S. DISTRICT COURT  
W.D.N.Y. - BUFFALO

07-CV-0566A

**ORDER**

Petitioner, Anibal Maldonado, pro se, has filed the instant petition for habeas corpus relief, pursuant to 28 U.S.C. § 2254, seeking an immediate release from incarceration alleging that he has been denied good time credit allowances because he has refused to participate in or has been removed from an Alcohol and Substance Abuse Treatment Program ("ASAT"). He claims that the denial of good time allowances has resulted in his being held beyond his conditional release date and that the finding by the Time Allowance Committee that he had failed to complete the ASAT program was in violation of his right to due process. (Docket No. 1). The determination of the Time Allowance Committee was confirmed by the Superintendent of Gowanda on March 19, 2007, and was affirmed by the Commissioner of the New York State Department of Correctional Services on March 30, 2007. (Docket No. 1, Petition, Exh. D1). Petitioner admits in the petition that he has not exhausted his state court remedies because he is "looking for speedy release from

custody." (Id., Petition, p. 6). Petitioner also seeks to proceed *in forma pauperis*. (Docket No. 4).

In an earlier action filed by petitioner under 28 U.S.C. § 2241, petitioner claimed he was denied good time allowances because he had not completed a DWI Program due to his claim that he had been advised that he did not need to participate in that Program. (Maldonado v. Savage, 07-CV-0106A(M) ("Maldonado I"). The Court issued an Order noting that the petition should have been brought under 28 U.S.C. § 2254, not § 2241, because it involved a challenge to the execution of a sentence on a state court conviction, see Cook v. New York State Div. of Parole, 321 F.3d 274 (2d Cir. 2003), and advising petitioner that, pursuant to Adams v. United States, 155 F.3d 582, 584 (2d Cir. 1998) (per curiam), the petition would be recharacterized as a petition under § 2254 unless petitioner advised the Court that he did not wish to have the petitioner recharacterized and would rather have it withdrawn. (Maldonado I, Docket No. 3, Order, at 3-5)). The Court also instructed petitioner that, if he did not oppose the recharacterization of the petition, he needed to show cause why the petition should not be dismissed for his failure to exhaust state court remedies. (Id., at 5-7 (citing 28 U.S.C. § 2254(b)(1)(A); O'Sullivan v. Boerckel, 526 U.S. 838 (1999))).

Petitioner filed a response to the Order stating that he did not object to the recharacterization of the petition and did not

wish the petition to be dismissed. The response failed, however, to address, as directed, whether or not petitioner had exhausted state court remedies. Petitioner simply reiterated what he had stated in his petition.<sup>1</sup> Accordingly, the Court dismissed the petition without prejudice because he failed to establish that he had exhausted his claims in the courts of New York State. (Maldonado I, Docket No. 5, Decision and Order, at 2-3). Following entry of judgment (id., Docket No. 6), petitioner filed a notice of appeal which was subsequently dismissed by the Court of Appeals based on that Court's denial of a certificate of appealability. (Id., Docket No. 9, Mandate).

The instant petition, similarly, must be dismissed because it appears on its face that petitioner has not in any way attempted to exhaust his state court remedies. Specifically, petitioner admits that he has not exhausted his state court remedies. (Docket No. 1, Petition, at 6). Section 2254(b)(1)'s exhaustion requirement is not satisfied until the federal claim has been "fairly presented" to the highest court of the state involved. Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 808-09 (2d Cir.2000) (citing Picard v. Connor, 404 U.S. 270, 275 (1971)). Petitioner readily admits that he has not raised the claims presented in his petition to the state courts. He simply notes that he wrote to the Superintendent,

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<sup>1</sup>Petitioner's response stated that the Time Allowance Committee had found him guilty "'on the wrong facts'" because he was never enrolled in a DWI Program but rather was enrolled in a Alcohol and Substance Abuse (ASAT) Program. (Maldonado I, Docket No. 5, Decision and Order, at 2) (citation omitted).

appealed to the Time Allowance Committee and wrote to "many correctional counselors. . . ." (Docket No. 1, Petition, at 6).

The petition is hereby dismissed without prejudice pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. In addition, because the issues raised here are not the type of issues that a court could resolve in a different manner, and because these issues are not debatable among jurists of reason, the Court concludes that petitioner has failed to make a substantial showing of the denial of a constitutional right, 28 U.S.C. § 2253(c)(2), and accordingly the Court denies a certificate of appealability.

The Court also hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this judgment would not be taken in good faith and therefore denies leave to appeal as a poor person. Coppedge v. United States, 369 U.S. 438 (1962).

Petitioner must file any notice of appeal with the Clerk's Office, United States District Court, Western District of New York, within thirty (30) days of the date of judgment in this action. Requests to proceed on appeal as a poor person must be filed with the United States Court of Appeals for the Second Circuit in accordance with the requirements of Rule 24 of the Federal Rules of Appellate Procedure.

IT HEREBY IS ORDERED, that the petition is dismissed without prejudice;

FURTHER, that a certificate of appealability is denied; and  
FURTHER, that leave to appeal as a poor person is denied.

**SO ORDERED.**

s/Michael A. Telesca  
MICHAEL A. TELESCA  
United States District Judge

Dated: March 3, 2008  
Rochester, New York